
THIRD READING

Bill No: SB 472
Author: Caballero (D)
Amended: 5/7/19
Vote: 21

SENATE BANKING & F.I. COMMITTEE: 7-0, 4/10/19

AYES: Bradford, Chang, Caballero, Durazo, Hueso, Morrell, Portantino

SENATE JUDICIARY COMMITTEE: 8-0, 4/30/19

AYES: Jackson, Borgeas, Allen, Caballero, Jones, Stern, Umberg, Wieckowski

NO VOTE RECORDED: Monning

SUBJECT: Earned income access service providers

SOURCE: PayActiv

DIGEST: This bill establishes a framework for the regulation of earned income access service providers, as specified.

ANALYSIS:

Existing law:

- 1) Does not include, within the codes that generally apply to financial services providers, a statutory framework for the regulation of businesses that allow employees and independent contractors to gain access to wages they have earned, prior to their regular payday.
- 2) Provides that no person shall issue in payment of wages due, or to become due, or as an advance on wages to be earned any order, check, draft, note, memorandum, or other acknowledgement of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, as specified. (Labor Code Section 212)

This bill:

- 1) Defines the terms “delivery,” “consumer,” “earned income,” “earned but unpaid income,” “earned income access service provider,” and “earned income obligor.”
 - a) Earned income is money that a consumer (i.e., a natural person) has represented, and an earned income access service provider has reasonably determined, have accrued to the benefit of that consumer for services rendered to an earned income obligor.
 - b) An earned income obligor is either an employer or another person who is contractually obligated to pay a consumer a sum of money for labor or services provided by that consumer to or on behalf of that other person, as specified.
 - c) An earned income access service provider is a person engaged in the business of delivering earned but unpaid income to a consumer in California.
- 2) Authorizes an earned income access service provider to offer earned income access services in either of the following ways:
 - a) Through a contractual arrangement with an earned income obligor in which the provider delivers earned income to the consumer prior to the consumer’s payday, and the obligor deducts the amount of the earned income delivered by the provider from the consumer’s next paycheck. This arrangement is colloquially known as the “direct to business” model.
 - b) Through a contractual arrangement with a consumer in which the provider delivers earned income directly to a consumer and is repaid directly by the consumer. This arrangement is colloquially known as the “direct to consumer” model.
- 3) Requires earned income access service providers to do all of the following:
 - a) Allow a consumer to cancel participation in an earned income access program at any time without incurring a charge for doing so.
 - b) Provide each consumer with a document, written in a minimum 12-point font size and in language intended to be understood by a layperson, informing the consumer of his or her rights under the earned income access

program, including instructions for how to cancel participation.

- c) Deliver earned income to a consumer via any means mutually agreeable to the consumer and provider and refrain from charging consumers different amounts, based on the manner in which the consumer elects to receive the funds.
 - d) Provide more than 50% of the amount of a consumer's gross earned but unpaid income as of the date and time of the consumer's request for funds.
 - e) Charge a consumer more than \$14 per monthly pay period for participating in an earned income access service program, an amount that must be prorated for shorter periods (thus, this fee could not exceed \$7 per pay period for workers who get paid twice a month). Fees may be charged on a periodic basis, a per delivery basis, or a combination of the two, but may not exceed the \$14 per month cap.
 - f) Provide earned income to a consumer more than three times in a single pay period.
 - g) Limit the number of pay periods per year during which a consumer may access earned income prior to their payday.
 - h) Provide in its contract with an obligor that the obligor may not charge a consumer, directly or indirectly, for participating in an earned income access service program.
- 4) Requires earned income access service providers to maintain a minimum net worth of at least \$250,000; a fidelity bond or bonds in an amount not less than \$250,000, as specified; and errors and omissions insurance in an amount not less than \$250,000, as specified; and clarifies that each of these requirements is independent of one another, and an act taken to satisfy one of these requirements may not be used to satisfy either of the others.
- 5) Prohibits an earned income access service provider from doing any of the following:
- a) Requiring a consumer to open, maintain, or close a checking account at any particular depository institution, accept direct deposit of his or her wages into any specific depository institution; or sign up for any other product or

service, as a condition of offering earned income access services to that consumer.

- b) Trying to debit a consumer's depository institution account after the provider receives notice of a failed payment transfer from that account. Notwithstanding this prohibition, a provider may initiate an additional payment transfer from a consumer's account following a failed attempt, if the subsequent payment transfer is authorized by the consumer.
 - c) Initiating a payment transfer from a consumer's account without first notifying that consumer, at least two days before the date of each transfer, of the amount due and the date the transfer will be attempted.
- 6) Provides that a person who violates the aforementioned rules is subject to a civil suit in a court of competent jurisdiction and to a civil penalty of up to \$2,000 per violation.
- 7) Provides that the delivery of earned but unpaid income to a consumer by an earned income access service provider in accordance with the aforementioned rules does not represent a credit transaction under state law, because the funds provided to the consumer are those that the consumer has already earned. Further provides that the imposition of one or more fees on a consumer who opts to use the services of an earned income access service provider does not represent a violation of Labor Code Section 212, as long as the consumer is informed in writing of his or her right to receive the full amount of his or her wages, without discount, if the consumer waits until his or her regular payday.

Background

According to information provided by the sponsor and available online, there appear to be at least eight companies currently offering earned income access services: PayActiv, Even, DailyPay, Earnin, FlexWage, Dave, Brigit, and ZayZoon. The business models of these companies vary, and new companies enter this space regularly.

Some of the companies work via a direct-to-business model (D2B). In this model, the provider contracts with an employer that agrees to share employment and attendance data with the provider. Employees and independent contractors who work for the employer are invited to sign up for the service, which is typically made available via an online app. The fee for the service can be paid by the employer, by both the employer and the consumer, or, more commonly, by the

consumer. When a consumer elects to receive a wage advance from a provider that has a D2B arrangement, the provider informs the employer of the amount of money advanced to the consumer, and, in states where payroll deductions are permitted, the employer deducts that amount from the consumer's next paycheck. In states where payroll deductions are not permitted, the provider debits the consumer's bank account on or after the consumer's payday.

The second business model currently in use is known as the direct-to-consumer model. In this model, the provider may, but need not, contract with a company that offers payroll or time and attendance services. In cases where a payroll or time and attendance company is involved, the provider is able to obtain employment and attendance data from its payroll or time and attendance partner. In cases where no payroll or time and attendance company is involved, the provider typically uses information provided by the consumer as the basis to calculate how much money an employee has earned as of the date and time of their request for a wage advance. In both cases, when the consumer requests a wage advance, the provider advances the money directly to the consumer and then debits the consumer's bank account on or after the consumer's next payday. All fees are paid by the consumer.

Some of the companies in this space offer a suite of consumer-focused services in addition to wage advances. For example, Even offers a budgeting tool along with its wage advance service. PayActiv offers a budgeting and savings tool, financial counseling, and bill paying service along with its wage advance services. FlexWage offers a financial wellness service.

Fees charged by the companies also vary. PayActiv charges a flat fee per pay period (\$5 for a two-week or longer pay period and \$3 for a weekly pay period). DailyPay charges a flat fee of \$1.25 for next-day delivery and \$2.99 for instant delivery, payable each time the consumer requests an advance. Earnin doesn't charge fees; instead, it encourages its users to tip the company when they feel their financial situation allows. All of these companies limit the number of times per pay period their users may request wage advances, but the limits vary from company to company.

Despite the variability summarized above, all of the companies in this space are attempting to address the same problem: the challenges faced by individuals who live paycheck to paycheck, and whose expenses often come at a time when they are in-between paychecks.

Comments

As is often the case when a new financial services business model is introduced to the public, state regulators have expressed interest. California's Department of Business Oversight has engaged in discussions with the companies currently operating in California, and the New York Department of Financial Services recently subpoenaed Earnin, seeking 21 different categories of records ("Cash-advance app Earnin gets subpoenaed by NY regulator," Kevin Dugan, *New York Post*, March 28, 2019). This bill is an attempt by the bill's sponsor to provide earned income access providers operating in California with the regulatory certainty that is lacking elsewhere. If enacted, this bill could become a national model for the regulation of this industry.

The approach taken in this bill. This bill does not create a new licensing law for earned income access service providers, nor does it amend an existing licensing law to include earned income access service providers. Instead, it uses an approach the Legislature has used in the past when facing the reality that there were too few companies offering a financial service to support a new licensing law (e.g., SB 1007, Machado, Chapter 708, Statutes of 2008). Like SB 1007, this bill defines the persons and activities the author and sponsor wish to regulate; codifies a series of requirements that must be satisfied by companies wishing to engage in those activities; codifies a series of allowable, required, and prohibited activities; and provides a judicial enforcement mechanism for those who wish to enforce violations of the statute.

The approach taken in this bill reflects the reality that there are too few companies currently offering earned income access services to support a new licensing law. Any new licensing law entails a certain expense. Regulations must be promulgated, licensing staff hired, applications processed, and examination staff hired and trained. These costs can be substantial, and spreading them across a small number of relatively new (and relatively small) companies could put those companies out of business or significantly stunt their growth. These costs could also create a barrier to entry for new companies wishing to enter the market.

This bill's approach also reflects the reality that no existing regulatory scheme appears to be a good fit for earned income access service providers. The three closest possibilities are the California Financing Law, California Deferred Deposit Transaction Law, and the Money Transmission Act, but none of these laws can be readily amended to incorporate the earned income access service provider model.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 5/2/19)

PayActiv (source)

OPPOSITION: (Verified 5/2/19)

One individual

ARGUMENTS IN SUPPORT: PayActiv, this bill's sponsor, writes, "earned income access provides an exciting new alternative for consumers. Rather than attempting to reduce the supply of expensive and often risky alternative forms of money, earned income access programs provide a less expensive, less risky and socially responsible alternative that can serve to reduce the demand for such money." SB 472 "will provide strong consumer protections, impose consumer-friendly requirements on providers of 'earned income access' programs, and create statutory clarity for regulating these programs to ensure consumers have access to the benefits of these socially responsible programs."

ARGUMENTS IN OPPOSITION: Pedro Ibarra, a former employee of PayActiv, opposes the bill on grounds that it lacks sufficient consumer protections. "SB 472 currently benefits Earned Income Service Providers by prohibiting early wage transactions as being considered as a noncredit financial service eliminating any protections, disclosures, and regulations enacted to protect Californians accessing credit financial services. Further, it also fails to include consumer protection preventing payment plans for wages not yet earned, the rolling over of the balance not fully repaid, or prohibit the enticement to consumers of utilizing financially predatory instruments such as prepaid cards."

Prepared by: Eileen Newhall / B. & F.I. /
5/8/19 16:24:18

**** END ****